SUPREME COURT, U. S

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-983

JOSEPH A. MALONEY, d/b/a
THE APALACHICOLA TIMES,
Petitioner,

versus

B. ROY GIBSON, JR., and ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Florida and
District Court of Appeal of Florida, First District

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Petition for Writ of Certiorari to the Supreme Court of
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Petitioner prays a Writ of Certiorari issue to review the Judgment and Opinion of the District Court of Appeal of Florida, entered in the above-entitled cause on June 4, 1974. (App. E) This Opinion is reported in 295 So.2d 120.

Petition for Writ of Certiorari was directed to the Supreme Court of the State of Florida to review the Judgment and Opinion of the District Court of Appeal.

First District. The Supreme Court of Florida by its Order entered November 13, 1974, one justice dissenting, denied the Petition for Writ of Certiorari. (App. F)

OPINIONS BELOW

The Opinion of the District Court of Appeal, First District, entered June 4, 1974, was a per curiam opinion holding:

> "Affirmed on authority of GIBSON V. MALONEY, 231 So. 2d 823 (Fla. 1970); GIBSON V. MALONEY, 263 So. 2d 632 (Fla. App. 1972), cert. den. 410 U.S. 984." (App. E)

Petition for Writ of Certiorari was filed with the Supreme Court of Florida to review the Opinion of the District Court of Appeal, First District, and this Petition was denied by formal order of the court dated November 13, 1974. (App. F)

The Opinion of the District Court of Appeal of Florida, First District, which is relied upon by the court in its Opinion filed June 4, 1974, as the basis for the affirmance of the subsequent appeal, is reported in 263 So.2d 632.

This Opinion appears as Appendix C to this Petition for Writ of Certiorari.

Petition for Writ of Certiorari to review the Opinion of the District Court entered June 4, 1974 (App. C) was filed with the Supreme Court of Florida and denied by order entered November 7, 1972.

This order appears as Appendix A to this Petition.

A Petition for Writ of Certiorari was filed with this court and subsequently denied by your order entered March 19, 1973.

This order appears as Appendix G to this Petition and is reported at 410 U.S. 984.

JURISDICTION

The Order of the Supreme Court of Florida denying the Writ of Certiorari to be directed to the District Court of Appeal of Florida, First District, *was filed November 13, 1974.* (App. F)

The jurisdiction of this court is invoked under and pursuant to the provisions of 28 U.S.C., Sec. 1257(3) and Rule 19(1)(a), Supreme Court Rules.

The Petition is filed within 90 days from the date of the order, review of which is sought by this Petition. (App. F)

The Writ of Certiorari is to be directed to the Opinion of the District Court of Appeal of Florida, First District, filed June 4, 1974, which Opinion affirmed an order of the trial court dismissing the claim of Petitioner *on the authority of the earlier Opinion of the District Court of Appeal in the same cause reported at 263 So.2d 632, which Opinion now conflicts with the decision of this court in the cases of*

GERTZ V. ROBERT WELCH, INC.
(June 25, 1974, Case No. 72-617)
410 U.S. 925, and
MARGARET MAE CANTRELL, ET AL. V. FOREST CITY PUBLISHING COMPANY (Case No. 73-5520) Opinion filed December 18, 1974.

QUESTIONS PRESENTED

One

Does The Opinion Of The District Court Of Appeal Of Florida, First District, Affirming The Trial Court's Order Dismissing With Prejudice The Claim For Libel Filed By Petitioner Decided A Substantial Federal Question In A Manner Not In Accord With Current Decisions Of This Court?

Two

Does The Opinion Of The District Court Of Appeal Of Florida, First District, Affirming Upon The Authority Of Its Earlier Opinion In This Cause, Misapply And Reach A Result Contrary To The Decisions Of This Court In Gertz v. Robert Welch, Inc., 410 U.S. 925, And Cantrell v. Forest City Publishing Company (Case No. 73-5520) Opinion Filed December 18, 1974, And Thereby Deny Petitioner His Rights Under The First, Fourteenth And Seventh Amendments To The Constitution Of The United States?

STATEMENT OF THE CASE

Petitioner was the original Plaintiff in a libel and slander action filed in the Circuit Court of Franklin County, Florida.

A Judgment was entered after the first trial based upon a jury verdict awarding Petitioner $10,000 compensatory damages and $5,000 punitive damages. (App. C. App. 13, 14)

The District Court of Appeal of Florida, First District considered that Judgment on appeal by these Respondents and affirmed the Judgment awarding both compensatory and punitive damages. (*Gibson v. Maloney*, Fla. App. 1968, 214 So.2d 89)

The Supreme Court of Florida then granted certiorari and quashed the Opinion of the District Court of Appeal remanding the cause to that court with instructions to further remand the cause to the trial court for a new trial upon proper instructions on the law. (*Gibson v. Maloney*, Fla. 1970, 231 So.2d 823)

A second trial was held in the Circuit Court of Franklin County in January, 1971. This resulted in a mistrial when the jury was unable to agree on a verdict.

In May, 1971, a third trial was held which resulted in a verdict and judgment against both Respondents for $5,000 compensatory damages and $20,000 punitive damages against the corporate Respondent. (App. C. App. 13)

That verdict and judgment of the Circuit Court was then again appealed to the District Court of Appeal of Florida, First District, by these Respondents and that court on June 13, 1972, entered its Opinion reversing the trial court and remanding the cause to the trial court with *"directions to enter judgment in favor of the Appellants."* (*Gibson v. Maloney*, Fla.App. 1972, 263 So.2d 632) (App. C, App. 13-24)

Petitioner then sought certiorari from the Supreme Court of Florida to review the Opinion of the District Court of Appeal and certiorari was denied by Order of the Supreme Court filed November 7, 1972. (App. A, App. 1, 2)

Following the denial of certiorari by this court, the trial court entered its Final Judgment dated August 7, 1973, dismissing Petitioner's claim for libel with prejudice and assessing costs against him in the sum of $2,346.58. (App. H)

This Final Judgment was then appealed to the District Court of Appeal, First District, and that court affirmed the trial court by its Opinion, review of which is now sought. (App. E)

Writ of Certiorari was then applied for in the Supreme Court of Florida and denied by that court. (App. F)

This renders the matter a "Final Judgment" within the meaning of that term, as used by this court in consideration of matters which are subject to review by certiorari. (*Catlin v. United States*, 324 U.S. 229, 233;

Gillespie v. U.S. Steel Corp., 1964, 379 U.S. 148; 9 Moore's Federal Practice, Sec. 110.08. Pgs. 111-118)

The basis for the decision, review of which is now sought, was the District Court of Appeal of Florida's interpretation and application of the opinions of this court construing state laws of libel and slander in light of the restrictions placed upon such laws by the constitutional guarantees contained in the First, Seventh and Fourteenth Amendments to the United States Constitution.

Particularly and specifically, the District Court in its Opinion affirming upon the basis of its earlier opinion in this matter relied exclusively upon the decision of this court in

ROSENBLOOM V. METROMEDIA
403 U.S. 29, 91 S.Ct. 1811,

which opinion was receded from by this court in its subsequent opinion entered June 25, 1974 in

ELMER GERTZ V. ROBERT WELCH, INC.
410 U.S. 925.

The decision by this Court in Gertz, supra, had not been handed down at the time the District Court of Appeal affirmed the Final Judgment of the trial court by opinion entered June 4, 1974, but the Gertz opinion was available prior to the decision by the Supreme Court of Florida on the Petition for Writ of Certiorari and was the basis for seeking review by that court.

The decision in *Cantrell, supra*, which again concerns itself with actual malice albeit in an invasion of privacy action rather than libel and slander, was not decided until after the state court action in this matter was concluded.

STAGE OF PROCEEDINGS WHERE FEDERAL QUESTION FIRST RAISED

The federal question pertaining to the right of comment in the instance of allegedly "public figures" was first raised in this cause in the Answer to Amended Complaint for Libel and Slander filed in the trial court:

SIXTH DEFENSE

> "* * * The Words complained of were made without malice on the activities of the Plaintiff as a public person or official and are conditionally privileged and constitute fair comment."

The issue remained present throughout the original trial, the first appeals in this cause, and the second trial and appeals. The determinative factor in the decision now before this court was the interpretation and evaluation of what constitutes "actionable libel" and proof thereof with "convincing clarity" as set forth in the Opinions of this court interpreting the provisions of state statutes governing libel and slander in light of the guarantees of free speech and free press under the United States Constitution and Amendments thereto.

The decisive factor in the litigation was the interpretation and application of the cited decisions of this court interpreting federal constitutional rights and privileges as applied to Florida Statutes governing libel and slander. The gist of Petitioner's complaint here is the *District Court misinterpreted and misapplied decisions of this court interpreting federal constitutional provisions.*

The substantial federal question has been the issue in this cause since the original pleadings and was the determinative factor in the eventual result reached by each court which has considered the matter.

REASONS FOR GRANTING THE WRIT

The District Court of Appeal of Florida in relying upon and applying the opinions of this court in *Rosenbloom v. Metromedia, supra,* misinterpreted and misapplied the law as pronounced by this court in those decisions and reached a conclusion, contrary to that reached by this court in subsequent decisions. *Gertz, supra,* and *Cantrell, supra,* concerning the applicable provisions of the constitutional right of free speech in relation to comment upon public figures or officials.

Secondly, the District Court of Appeal improperly extended the right of comment on the actions of a "public figure" (assuming arguendo the publisher of a small weekly newspaper can be a "public figure" under the facts and circumstances shown in this Petition and Appendix) to include remarks made by a private

individual to a selected group (a Rotary Club) not for dissemination to the general public and which were in support of the business interests of the person making the statement or his corporate employer.

The Supreme Court of Florida, denying review of the District Court opinion which was predicated upon this court's decision in *Rosenbloom v. Metromedia, supra*, ignored and failed to apply the subsequent decision by this court in *Gertz v. Welch, supra*, and *Cantrell v. Forest City Publishing Co., supra*.

This results in a misapplication and misinterpretation of the current prevailing expression by this court on the federal constitutional rights to be applied in a first amendment freedom of speech issue.

Particularly would this be true when the private individual making the statements alleged to be libelous against this Petitioner made such statements to this private select group and the statements were, as pointed out in the opinion by the District Court of Appeal, "*erroneous, inaccurate, and negligently made.*" (App. C, App. 22)

The individual Respondent, Defendant below, who made the actual statements complained of and subsequently had them printed and mailed out to a select, captive audience of telephone subscribers of the corporate Defendant, of which he was the President, made statements which were admittedly erroneous, and they were made by this individual *who would by reason of his position as President of the telephone company have access to the actual facts and would be*

a person upon whose opinion the general public would necessarily rely as to truth and accuracy because of the position occupied by the Defendant and his access to the factual information which he erroneously reported.

The District Court admitted the *erroneous, inaccurate and negligent nature of these factual statements* made by this individual Respondent acting on behalf of the corporate Respondent and, *when a trial jury twice concluded such inaccurate factual statements were made with actual malice by a person who knew them to be false or should by reason of his position have such knowledge,* the District Court concluded as a matter of law the jury's findings should be disregarded.

The District Court in its Opinion said:

> "Gibson erroneously represented the statistics of telephone subscribers in Apalachicola when he stated that the number of subscribers in the Apalachicola exchange was reduced by 74 by not explaining at the same time that the telephone company had transferred those telephones from the Apalachicola exchange to the newly established telephone exchange across the bay at East Point. Thus, his statement was erroneous, inaccurate, and negligently made." (App. C, App. 22)

The statement made and circulated by this private individual acting on behalf of his corporate employer

asserted a loss of telephone subscribers in a particular exchange and then attributed this loss in direct, positive and unequivocal terms to this Petitioner and his activities as publisher of a local newspaper.

Respondent GIBSON said and subsequently had printed and mailed out to a selected audience:

> "Now, I shall take Apalachicola: Our exchange there in the year 1964 lost 74 telephones — only exchange that we have that showed any loss in telephones — and, in my opinion, this loss can be attributed largely to the local newspaper in Apalachicola and its publisher, who seems to take pleasure in berating and abusing any business interest in his community, including the larger taxpayers in his County; * * *;" (App. C, App. 15)

The statement was at all times false and this Defendant had to know this for he was the president of the telephone company. He admitted he was aware of the opening of a new exchange and the transfer of subscribers to that exchange from the Apalachicola exchange. (App. C, App. 15 & 22)

At no time has any decision of this court, including the decisions relied upon by the District Court of Appeal, ever extended to or made immune from prosecution for damages *a private individual who makes admittedly erroneous and inaccurate factual statements* where he by reason of his position as president of the company involved would have first-hand knowledge of the accurate facts and would be expected

by the general public to speak the truth, when such statements are made not in the pressure of time of public broadcasting or news reporting but in a prepared speech delivered before a selected, private group and subsequently printed and mailed out to a captive audience of telephone company subscribers who had not requested such information but would be expected to believe in its accuracy because of its source.

At the time this court denied certiorari on March 19, 1973, the prevailing law on the issue of libel was that pronounced by this court in Rosenbloom v. Metromedia, *403 U.S. 29 (1971), and that could well have been the basis for the action taken by this court.*

The matter is before the court again for review after the court has receded from the broad import of *Rosenbloom* by its decision in *Gertz v. Robert Welch, Inc.*, 410 U.S. 925 (June, 1974), and further defined "actual malice" and a jury's right to find "actual malice" in *Cantrell v. Forest City Publishing Co., supra.*

The factual situation involving the issue of "public official or public figure" in the *Gertz* decision would show by simple comparison the Petitioner in this cause could not fit into that criteria.

In *Gertz* the trial judge had directed a verdict of liability because of the failure of the publication to prove "public official or public figure" and submitted the case to the jury on the issue of damages alone. (Op. Pg. 5)

Following a jury verdict and on posttrial motions, the trial judge entered a judgment for the publication notwithstanding the jury's verdict on the basis the discussion concerned a "public issue without regard to the status of a person defamed therein." (Op. Pg. 5)

The Circuit Court of Appeals, Seventh Circuit, endorsed the District Court's conclusion that Petitioner had failed to show by clear and convincing evidence that Respondent had acted with " 'actual malice' as defined by *New York Times.*" (Op. Pg. 7-8)

The Circuit Court of Appeals then affirmed the Judgment Notwithstanding the Verdict entered by the trial court. (471 F.2d 801; 1972)

This court then reversed the Circuit Court of Appeals and ordered the case remanded for a new trial under the applicable principles of law enunciated in its opinion.

The majority opinion by Justice Powell, with Justices Stewart, Marshall, Blackmun and Reahnquist concurring, directed a new trial. *There were dissenting opinions by Justice Douglass, Justice Brenan and Justice White which would have reinstated the jury verdict and judgment based thereon in favor of the Petitioner.*

In the case now before the court for review, we have a factual situation legally similar to the situation before the court in *Cantrell, supra.*

In the instant case, *two juries have found from the testimony and evidence before them the Respondent was guilty of libel and in addition, as manifested by the award of punitive damages by the jury, guilty of actual malice in the making of such statements.*

The District Court of Appeal in its opinion which forms the basis for the affirmance now before the court for review found:

> "* * * *thus, his statement* (Appellee Gibson) *was erroneous, inaccurate and negligently made.*" (App. 22)

This is legally similar to the conclusion in the *Cantrell* decision "a jury finding that the Respondents Joseph Eszterhas and Forest City Publishing Company had published knowing or reckless falsehoods about the Cantrells." (Op. Pg. 7) and which constituted a basis for the jury verdict you reinstated in *Cantrell.*

Maloney seeks to have his jury verdict based on legally similar facts and a compatible finding by a jury reinstated. *The State Appellate Court saw fit to not only upset the jury's verdict but to remand the case with instructions to enter a Judgment for Respondent.*

Petitioner has been without his day save in the trial court and this has been rendered nugatory by the appellate court action. Petitioner is certainly entitled to relief for the publication of admittedly "*erroneous, inaccurate and negligently made*" statement by Respondent.

The recent decisions distinguishing *common law malice* and *actual malice* would mandate a reinstatement of the compensatory damage award and, at the minimum, a retrial of the punitive damage award, if indeed, not reinstatement of both damage awards.

CONCLUSION

Petitioner has thus far been without relief for indeed the appellate courts have acted upon the law as they saw it to exist at the time of the decision (*Metromedia v. Rosenbloom, supra*) when to the detriment of this Petitioner but have failed to recognize subsequent decisions by this court when they substantiate the position taken by your Petitioner. (*Gertz, supra; Cantrell, supra*)

The decision before this court concerns admittedly "erroneous, inaccurate and negligently made" statements for which a jury awarded compensatory and punitive damages but from which award Petitioner has received nothing by reason of the subsequent actions of the state appellate courts.

Petitioner respectfully requests this court issue its Writ of Certiorari and set this matter for hearing on the merits.

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CERTIFICATE OF SERVICE

I certify copy of the foregoing Petition for Writ of Certiorari was furnished Isler, Welch, Bryant, Smith & Higby, 434 Magnolia Ave., Panama City, Florida, attorneys for Respondents, this ____ day of _____, 1975.

_____